In the

Supreme Court of the United States

OCTOBER TERM, 1958

No. 335

SUN OIL COMPANY,

Petitioner,

v.

FEDERAL POWER COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

WITH APPENDIX

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No.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Sun Oil Company prays that a writ of certiorari issue to review certain judgments of the United States Court of Appeals for the Fifth Circuit entered on May 9, 1958.

OPINIONS BELOW

Six cases involving petitions to review related orders of the Federal Power Commission were consolidated by the Court of Appeals for the purpose of briefing and oral argument (R. 16410, 81).[1] The single opinion of the Court of

[1] References to the record herein are made according to the page of the record printed in each case in the Court of Appeals prior to consolidation of the cases by that Court.

Appeals and the judgments entered in the consolidated cases are printed in the Appendix to this petition; the opinion is not yet reported. The orders of the Federal Power Commission which are the subject of the cases in the Court of Appeals are set forth in the transcript of record (R. 16020, 61; R. 16021, 216; R. 16213, 116; R. 16321, 104; R. 16410, 225; R. 16410, 235; R. 16548, 82).

JURISDICTION

This case involves review of judgments of the Court of Appeals for the Fifth Circuit, and jurisdiction of this Court is invoked under Section 19(b) of the Natural Gas Act, 15 U. S. C. 717r(b), and the provisions of 28 U. S. C. 1254(1).

DATE OF JUDGMENTS BELOW

The judgments of the Court of Appeals, printed in the Appendix, were dated May 9, 1958, and were entered on the same date. Petitioner's petition for rehearing was denied by the Court of Appeals on June 11, 1958, the order denying the petition being likewise printed in the Appendix.

QUESTIONS PRESENTED

1. Whether the Federal Power Commission may lawfully reject the rate schedule and certificate application filings of a person engaged in a sale of gas subject to the Commission's jurisdiction and vacate a certificate previously issued to such person, on the asserted ground that such person is not a "signatory party" to a gas sale contract, where the various filings meet all formal requirements of the Natural Gas Act and the Commission's regulations.

2. Whether the Federal Power Commission may lawfully reject such filings meeting all formal requirements and vacate the certificate previously issued without any advance notice or hearing and without setting out adequate findings and conclusions.

3. Whether the Federal Power Commission may lawfully certify to the Court of Appeals as a part of the record upon which the order complained of was purportedly entered documents not involving or relating to the Petitioner in any way but instead relating to the filings and proceedings before the Commission of other parties, proceedings to which the Petitioner was in no sense a party.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Natural Gas Act, June 21, 1938, as amended, 52 Stat. 821, 15 U. S. C. §§717-717w; the Administrative Procedure Act, as amended, 60 Stat. 237 (1946), 5 U. S. C. §§1001-1011; and the Fifth Amendment to the Constitution of the United States. Pertinent provisions of each are set forth in the Appendix to this petition.

STATEMENT OF THE CASE

Following this Court's decision in *Phillips Petroleum Company v. State of Wisconsin, 347 U. S. 672 (1954)*, the Federal Power Commission promulgated Orders Nos. 174, 174-A and 174-B incorporating into its regulations provisions especially applicable to "independent producers" of natural gas who are engaged in the sale of such gas in

interstate commerce for resale (18 C. F. R. §§154.91 et seq. and 157.23 et seq.).

In accordance with those regulations, but with various reservations as to jurisdiction, Petitioner filed with the Commission as its rate schedules, pursuant to Section 4 of the Natural Gas Act, a large number of contracts covering the sales of its gas, and in the case of each such sale Petitioner also filed with the Commission an application for a certificate of public convenience and necessity, pursuant to Section 7 of the Natural Gas Act. Included among those initial filings were four rate schedules and four certificate applications which gave rise to the cases in the Court of Appeals.

Each of the four situations involved a gas unit or oil and gas lease in which Petitioner owns less than the entire working interest in the gas production. In two of the cases Petitioner had, prior to the time of filing with the Commission, authorized the operator of the gas producing property to sell Petitioner's portion of the gas production, the operator to act to that extent in Petitioner's behalf and for its account and thus as Petitioner's agent. In the third case Petitioner had extended a like agency authority to the operator of a gas processing plant through which Petitioner's portion of the gas produced from a gas unit is processed. In the fourth case no agency authority was involved because there Petitioner had initially acquired its interest in a gas unit subject to a gas sale contract already in existence.

In each of the three agency cases Petitioner filed with the Commission as its rate schedule a copy of the gas sale contract made by the operator with the gas pipeline purchaser, together with other documents which explained the agency nature of the transaction between Petitioner and the operator. Since the operator acted as Petitioner's agent in making each gas sale involved, to the extent of Petitioner's portion of the gas, the sale by the operator as agent is in law a sale by the Petitioner as the principal, and the sale contract is thus Petitioner's contract to the extent of its portion of the gas involved. It was on the basis of this clear premise that Petitioner filed the various gas sale contracts as its rate schedules. In the fourth case Petitioner had simply acquired an interest in a pre-existing gas sale contract at the same time that it acquired its interest in the gas producing property, and Petitioner filed a copy of such contract with the Commission as its rate schedule, together with another document explaining the acquisition by Petitioner of an interest in the gas sale contract and in the gas producing property. In each of the four cases, even though Petitioner had not physically executed the original gas sale contract of which it filed a copy as its rate schedule, the contract was or had become its contract to the extent of its interest in the gas involved and the contract clearly covered the sale by Petitioner, either directly or as the principal in an agency transaction, of the gas which was the subject of Petitioner's rate schedule filing with the Commission.

In all of the cases the Commission formally accepted Petitioner's rate schedule filings and assigned rate sched-

ule numbers to the documents covering the various gas sales (R. 16020, 50; R. 16021, 197; R. 16021, 203; R. 16021, 205; R. 16213, 108; R. 16410, 160). In addition, in connection with the same gas sales, the Commission, in response to Petitioner's certificate applications, issued certificates of public convenience and necessity to Petitioner covering the various gas sales (R. 16321, 85; R. 16548, 73; R. 16548, 479).

At various times and by various letter orders and formal orders (here under review) issued following the rate schedule acceptances and certificate orders mentioned above, the Commission rescinded its earlier acceptances of Petitioner's rate schedule filings and rejected the rate schedule filings (R. 16020, 61; R. 16021, 216; R. 16213, 116; R. 16410, 225), and rescinded and vacated the certificates previously issued to Petitioner and rejected the applications for such certificates (R. 16321, 104; R. 16548, 82). All of the orders rejecting Petitioner's rate schedule filings and vacating the certificates previously issued to Petitioner were issued without notice to Petitioner and without according Petitioner an opportunity for hearing. All of the orders are based on the Commission's asserted premise that Petitioner is not a "signatory party" to the contracts under which Petitioner's gas is delivered in its behalf to the pipeline purchasers.

Petitioner filed applications for rehearing of the various orders of the Commission which had rejected Petitioner's rate filings and vacated Petitioner's certificates. Petitioner complained, among other things, that the orders exceeded

the Commission's authority under the Natural Gas Act and that Petitioner had not been accorded a hearing in the matters. All of the applications for rehearing were denied in perfunctory fashion. Petitioner then perfected its appeals from the various orders to the Court of Appeals for the Fifth Circuit under the provisions of Section 19(b) of the Natural Gas Act.

By judgments entered on May 9, 1958, based on a single opinion covering all of the consolidated cases, the orders of the Commission were affirmed by the Court of Appeals. Petitioner made timely filing of its petition for rehearing before the Court of Appeals, which the Court denied without opinion on June 11, 1958.

REASONS FOR GRANTING THE WRIT

I. Decision Below Raises Important Questions of Federal Law which Have Not Been, but Should Be, Settled by the Supreme Court.

The basic issue at the heart of this case is whether the Federal Power Commission shall be permitted to ignore important substantive provisions and requirements of the Natural Gas Act in order that it may promote its own administrative convenience and avoid the burden of administering filings of natural-gas companies which are clearly required by the Natural Gas Act. That issue is not adequately considered by either the Commission's orders here under review or the opinion of the Court of Appeals affirming those orders. It is imperative that this Court review the issue in this case before the administrative pattern for

the regulation of the vast producing segment of the gas industry under the Natural Gas Act becomes so firmly fixed in this respect that it may be virtually impossible later to alter the course of regulation to fit the requirements of the Act. Other issues are also present in this case which, although not at the heart of the case, involve other important aspects of the pattern of regulation of the producing segment of the gas industry and thus merit this Court's review in this case.

a. *The Court Below Erred in Its Interpretation of the Natural Gas Act.*

Under the provisions of the Natural Gas Act the requirements for filing rate schedules and securing certificates are imposed directly upon any person "engaged" in the sale in interstate commerce of natural gas for resale. This proposition is both self-evident and inherent in the provisions of Section 2(6) of the Act defining a "natural-gas company" as a person so "engaged" in the sale of gas; in the provisions of Section 4(c) of the Act requiring that "every natural-gas company" shall file with the Commission schedules showing all rates and charges for "any sale" subject to the jurisdiction of the Commission;[2] and in the provisions of Section 7(c) of the Act stating that no natural-gas company shall engage in a sale of gas subject to the Commission's jurisdiction unless there is in force "with

[2]Section 4(c) of the Act also provides that such rate schedules shall be filed "together with all contracts which in any manner affect or relate to such rates, charges, classifications and services." Petitioner fully complied with this provision in filing the contracts entered into by its agents and the pre-existing contract in which it acquired an interest when it acquired its ownership in a producing property.

respect to such natural-gas company" a certificate issued by the Commission authorizing such act.

Petitioner is itself clearly engaged in a sale of gas subject to the Commission's jurisdiction in each of the fact situations here involved, within the meaning of the provisions of the Natural Gas Act, particularly as construed by this Court in *Phillips Petroleum Company v. State of Wisconsin, 347 U. S. 672 (1954)*. In each of three of the situations Petitioner is so engaged as the principal in a sale made by its agent, and in each case the agent's authority is plainly limited to making the sale and delivering the gas and does not extend to the making of filings with the Federal Power Commission in connection with the sale. In the fourth situation Petitioner is engaged directly in the sale, having acquired an interest in a pre-existing gas sale contract at the time it acquired its interest in the gas producing property involved. Thus, Petitioner is the natural-gas company to which the above mentioned sections of the Act are directly applicable.

In each of the four situations the Commission itself has found, in a formal order issued after hearing and with full knowledge of the facts, that Petitioner is itself engaged in a jurisdictional sale of gas. This finding was entered in the orders by which Petitioner was issued certificates covering the sales (R. 16321, 85; R. 16548, 73; R. 16548, 479). It is noteworthy that in the later orders vacating the certificates (R. 16321, 104; R. 16548, 82) the Commission did not withdraw or qualify its earlier findings that Petitioner is engaged in jurisdictional sales. These findings establish

irrevocably the basis upon which Petitioner is, under the Natural Gas Act, both privileged and required to make its own rate and certificate filings with the Commission and thus determine the general course of regulation of its gas sales.

When the Commission issued its orders here under review rejecting Petitioner's rate filings and vacating its certificates (R. 16020, 61; R. 16021, 216; R. 16213, 116; R. 16321, 104; R. 16410, 225; R. 16410, 235; R. 16548, 82), without any hearing in the matters, it stated as its sole ground, not that Petitioner is not engaged in the sales involved, but rather that Petitioner is not a "signatory party" to the gas sale contracts involved. Yet nowhere in the Natural Gas Act did Congress either express or imply that lack of "signatory party" status might be considered a basis for prohibiting persons subject to the Act from making rate and certificate filings which are otherwise required and permitted by the Act. The conclusion reached by the Commission in this regard is in direct conflict with this Court's conclusion in *United Gas Pipe Line Company v. Mobile Gas Service Corporation*, 350 U. S. 332 (1956), that a natural-gas company may devise rates by contract arrangements of its own choosing and that the Natural Gas Act envisages rate schedules thus initiated by contract by the natural-gas company itself, not by the Commission. In the situations here involved Petitioner devised contract arrangements through agents and by assignment, but the contracts are, under the Act, no less subject to the rate and certificate filing requirements on that account. Moreover,

even if "signatory party" status were significant, Petitioner has such status through its agents and, in one case, by assignment of such status.

The effect of the Commission's orders is to impose upon Petitioner, with respect to the gas sales involved here, the rate and certificate filings of the various operators of the gas-producing properties and, in one case, the operator of a gas processing plant, together with all of the built-in consequences of those filings and of future proceedings before the Commission involving those filings. This effect strikes at the heart of the matter since it forever deprives Petitioner of the right which inherently accrues to any natural-gas company under the Natural Gas Act to initiate and control the scope of the regulation of its own gas sales by virtue of the nature of its own filings. This right is obviously of paramount importance in connection with the initiation and defense of rates. The Commission's orders would deprive Petitioner of the rights it is guaranteed by the Act in the process of regulation, but would nevertheless impose on Petitioner at the same time, without Petitioner's voice, all of the consequences of regulation through the device of indirectly regulating Petitioner's gas sales in the name and in the proceedings of other parties. Petitioner has continuously asserted, and asserts here, that there is no justification for such an administrative device and procedure within the framework of the Natural Gas Act, because the provisions of the Act with respect to rates and certificates clearly relate separately and independently to each natural-gas company and each jurisdictional gas sale.

It is apparent that the Commission conceives of its orders here under review as furthering a policy determination to relieve itself of the burden of administering so-called "multiple filings" of gas sale contracts. But as the Court of Appeals for the Third Circuit so aptly said under similar circumstances in *Mississippi River Fuel Corp. v. Federal Power Commission, 202 F. 2d 899 (1953), dism'd., 345 U. S. 988*, "If changes in the law are needed, or more personnel to administer existing law, or both, it is not for the administrative agency or the Courts to try to make up for this deficiency by taking unauthorized short cuts or indulging time saving procedures which fail to accord parties the rights which the law as written gives them."

In affirming the Commission's orders the Court of Appeals has stated in effect that the Commission's power under the Act to make rules and determine classifications is ample to justify its orders. But the rule-making power and the power to classify persons and matters which are granted the Commission in Sections 4(c) and 16 of the Act do not in any sense impair the substantive provisions of the Act. Those powers extend only to the prescription by regulation of the form and detail of the filings which the substantive provisions of the Act clearly require and permit. The authority to make rules and classify persons and matters can not under the Act properly be regarded as authority on the part of the Commission to prohibit by the rule-making process a filing which the substantive provisions of the Act both compel and permit.

Without directly discussing the impact of the substantive provisions of Sections 4 and 7 of the Act, and relying exclusively on the general rule-making authority of the Commission, the Court below disposed of the entire issue relating to the substantive provisions of the Act with this summary statement: "We agree with the Commission that each of the sales here involved made by an operator under an operating agreement could be properly treated as a single jurisdictional sale of the unit or leasehold gas production, and that each such sales contract could properly be the subject of a single rate filing." It is submitted that this conclusion is patently in error and should be reviewed by this Court. The Act provides for no discretion on the part of the Commission to treat multiple gas sales as a single jurisdictional sale of gas for purposes of regulation, but instead requires separate treatment of each gas sale subject to the jurisdiction of the Commission. Since the Act provided for no special contrary standard, the existence or non-existence of a separate jurisdictional gas sale must be determined in accordance with ordinary contract principles. *United Gas Pipe Line Company v. Mobile Gas Service Corporation, 350 U. S. 332 (1956).* In accordance with such principles the sale of Petitioner's share of the gas involved in each case is clearly a sale by Petitioner itself, acting either as the principal in an agency transaction or by acquisition of an interest in a gas sale contract already in existence. There is no authority in the Act for the treatment of Petitioner's sale of its gas and the unit or plant operator's sale of its gas as a single jurisdictional sale of both quantities. The substantive provisions of the Natural

Gas Act operate independently as to each such separate sale.

b. *The Orders Under Review Are Immediately and Substantially Detrimental to Petitioner.*

The Court of Appeals essentially predicated its opinion upon the absence of any harm, injury or prejudice to Petitioner resulting from the Commission orders under review. However, as stated above, since the Natural Gas Act clearly both compels and permits Petitioner under the circumstances of this case to make its own rate filings and secure its own certificates covering its gas sales, the criterion of harm, injury and prejudice is not at all applicable in judging the validity of the orders rejecting such filings. This case involves only the application of statutory standards which provide for no exercise of discretion on the part of the Commission. Where the Commission is by statute without discretion in a matter, there is no legal issue as to the presence or absence of injury, whether or not injury has been or may be shown. This is true, of course, for the simple reason that when Congress passes an Act empowering an administrative agency to carry on governmental activities, the power of the agency is circumscribed by the authority granted. *Stark v. Wickard, 321 U. S. 288, 309 (1944); Securities and Exchange Commission v. Chenery Corporation, 318 U. S. 80, 94, 95 (1943); Morgan v. United States, 298 U. S. 468, 479 (1936); Montana-Dakota Utilities Company v. Federal Power Commission, 169 F. 2d 392, 397 (8th Cir. 1948), cert. denied, 335 U. S. 853.* In this case the Commission has no color of statutory authority to

issue the orders under review and the orders are thus invalid, regardless of whether Petitioner has shown injury to it as flowing from the orders. Since the Court below has failed to consider this matter adequately its judgments should be reviewed.

Even if it be conceded, *arguendo*, that the Natural Gas Act grants to the Commission some general discretion in the substantive matter of filing rate and certificate documents, nevertheless the Commission's orders here under review constitute an abuse of such discretion and Petitioner is and will be injured and prejudiced by the orders. In this respect the orders deprive Petitioner of the due process which is guaranteed by the Fifth Amendment to the Constitution of the United States. The Court below failed in its opinion to give adequate consideration or recognition to the elements of injury and prejudice involved in this case and erred in concluding that no harm, injury or prejudice to Petitioner has resulted or will result from the Commission's orders.

Among the elements of prejudice and injury flowing from the Commission's orders is the fact that the orders, in rejecting Petitioner's rate and certificate filings and imposing the filings of other parties upon Petitioner with respect to its gas, deprive Petitioner of its substantive right, inherent in the Act, to make rate filings so as to preserve and protect its contract rights itself where an operator might fail to file, to make such filings in the form which will best promote its interests within the scope of the Act, and to make such filings in a timely manner so

as to make them fully effective in accordance with the contract where an operator might be delinquent. These are not problems which necessarily anticipate active malfeasance on the part of other private parties, as the Court below seems to suggest, but are simply manifestations of the inherent right of each natural-gas company under the Act to conduct its own business as it deems best within the scope of the Act. The Commission's orders, on the other hand, would impose another private party upon Petitioner as its agent for governmental regulation, without any voice, choice or control on the part of Petitioner. Moreover, the comment of the Court below that no injury to Petitioner has yet been shown to have occurred on account of this deprivation of right amounts to a suggestion that it will be soon enough to grant relief when positive money damage exists. But the injury has already occurred in the deprivation of right itself, and the remedy for some positive money damage which may later occur does not lie in compelling Petitioner to seek special *ad hoc* relief from the Commission—relief which would be granted, if at all, at the Commission's discretion, relief which would nearly always come too late to fully effectuate Petitioner's contract rights, and relief which can only follow long delays and complicated procedures. The only proper remedy is one which avoids the injury and the possibility of positive damage—and that remedy lies in permitting Petitioner to make its own filings in the first instance, just as the Natural Gas Act contemplates.

Injury to Petitioner resulting from the Commission's orders is even more readily apparent in the fact that two

of the operators whose filings would be imposed on Petitioner by those orders now have general rate proceedings under Section 5 of the Act pending before the Commission. The Court below seems to view the sole problem in this connection as being whether the Commission would permit Petitioner to intervene in such proceedings in order to protect its interest. In truth, Petitioner's being compelled as a result of the Commission's orders here under review to intervene in a prolonged proceeding involving all of the gas sales of the operator in order to protect an interest in one gas unit is serious injury indeed, even assuming that such intervention would be permitted by the Commission. But the real injury goes far beyond the matter of intervention. In such a proceeding involving the operator the Commission considers that one of the relevant issues is the cost of service and revenue requirements of such operator, and it is on the basis of those factors peculiar to the operator that all rates involved in the proceeding may be determined. Among those rates, according to the Commission's orders here under review, is the price applicable to Petitioner's gas. Hence, intervention by Petitioner and even active participation in the proceeding by Petitioner would be a futile gesture because factors germane to Petitioner are simply not in issue. Under the Commission's orders and the opinion of the Court below there is, then, no way in which Petitioner can protect its interest with respect to its gas. That is serious present injury without question.

Moreover, the same element of injury to Petitioner is inherent in any suspension proceeding under Section 4 of

the Act involving any of the rate schedules of other parties which have been imposed upon Petitioner by the Commission's orders here under review.

c. *The Orders Under Review Were Unlawfully Issued Without Notice or Hearing.*

The Commission's orders under review which rejected Petitioner's rate filings and vacated Petitioner's certificates were, without exception, issued without notice and without any hearing. For that reason alone the orders are invalid under the terms of the Natural Gas Act, the Administrative Procedure Act, and the Fifth Amendment to the Constitution of the United States.

With respect to rate schedule filings the Commission's entire basic authority is contained in Sections 4 and 5 of the Act. In so far as an initial rate schedule filing is concerned, the Commission is obliged to accept the filing if it meets all formal requirements. Under Section 4(e) the Commission may suspend a subsequent change in a rate schedule after observing certain statutory requirements. If the Commission takes such action it must ultimately "enter upon a hearing" and may enter a valid order affecting such change only "after full hearings." Under Section 5(a) of the Act, the Commission may enter an order altering a filed rate schedule only "after a hearing." Similarly, with respect to certificate applications, Section 7(c) of the Act requires that in all certificate cases "the Commission shall set the matter for hearing," and such a hearing is a matter of right. *Northeastern Gas Transmission Company*

v. Federal Power Commission, 195 F. 2d 872, 880 (3d Cir. 1952), cert. denied, 343 U. S. 818. Since the filings made by Petitioner met all formal requirements, any lawful rejection of such filings could occur only after a hearing, by virtue of the requirements of the Natural Gas Act itself.

Moreover, the Commission's orders purporting to vacate Petitioner's certificates are void similarly on account of the failure of the Commission to comply with the mandatory requirements of Section 9(b) of the Adiminstrative Procedure Act. With certain exceptions not applicable here, that section provides that no revocation of any license (including, by definition, a certificate) shall be lawful unless "prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements." In the issuance of the orders under review vacating Petitioner's certificates, the Commission made no effort to comply with Section 9(b) of the Administrative Procedure Act, it called no facts or conduct to the attention of Petitioner, and it did not afford to Petitioner an "opportunity to demonstrate or achieve compliance with all lawful requirements." The orders, then are in conflict with the important basic procedural requirements which Section 9(b) of the Act imposes upon the Commission.

Aside from the various statutory requirements of notice and hearing as a prerequisite to the validity of orders which have the effect of canceling certificates and rate schedules,

it is equally clear that the due process clause of the Fifth Amendment to the Constitution of the United States compels the same conclusion. For example, in *L. L. Wilson, Inc. v. Federal Communications Commission, 170 F. 2d 793 (D. C. Cir. 1948)*, the Court held that a hearing must precede a decision on modification of a license in order to avoid a conflict with the Constitution, even though the statute did not expressly provide for a hearing. And in *Standard Airlines, Inc. v. Civil Aeronautics Board, 177 F. 2d 18 (D. C. Cir. 1949)*, the Court held that an order suspending a registration must be set aside in the absence of a hearing, this conclusion being reached under the Constitution. If an order on modification of a license or an order suspending a license merits an advance hearing in order to accord constitutional due process to the licensee, *a fortiori* a proposal to *vacate* a certificate and *cancel* and *reject* rate schedules, as in Petitioner's case, must require notice and hearing in order to accord constitutional due process to Petitioner.

This Court made the requirement most clear in *Wong Yang Sung v. McGrath, 339 U. S. 33 (1950)*, when it held that even in the absence of an express provision in the statute for a hearing as a prerequisite to an administrative order of quasi-judicial character, a hearing is nevertheless compelled by the Constitution, and that such a hearing is subject to the formal procedural requirements of Section 5 of the Administrative Procedure Act. And this Court recognized the applicability of the doctrine of the *Wong Yang Sung* case to licensing proceedings of administrative agen-

cies by its per curiam decision in *Rigs & Co. v. United States, 341 U. S. 907 (1951), reversing 96 F. Supp. 452,* on the express authority of the *Wong Yang Sung* case.

It is now more than ever evident that the due process clause compels a hearing prior to action by any administrative agency in a licensing proceeding, even though the governing statutes may be silent on the subject. If the grant or denial of a license by an administrative agency must be preceded by notice and hearing in order to accord due process, then without doubt the vacation or revocation of a license previously issued or a rate schedule previously accepted for filing, as in Petitioner's case, must be preceded by notice and hearing—otherwise, the order is void for want of due process.

The Court below concluded in this respect that Petitioner was not entitled to notice and hearing prior to the issuance of the Commission's orders under review because no fact question was involved and hence no evidence would have been material, and because "the opportunity to be heard on questions of law is not an inherent element of procedural due process in the determination of a procedural question," citing *Federal Communications Commission v. WJR, The Goodwill Station, Inc., 337 U. S. 265 (1949).* But even if only a question of law were involved, as the Court below said, the requirement of opportunity to present argument, oral or otherwise, in some type of hearing before the administrative agency is not necessarily eliminated, as the Court below suggests. The very decision of this Court cited by the Court below makes clear that the enforcement of the

requirement varies from case to case, depending on the nature of the question and the statute involved. And in that case this Court was obviously influenced by the explicit terms of the statute and the fact that the question involved had been considered by the administrative agency on a written submission prior to its ruling. Here neither element is present.

The more serious error in this connection appearing in the opinion of the Court below lies in the Court's assumption that the principal question on the merits in this case is a mere procedural one. The Commission's orders under review have substantive consequences going far beyond mere matters of procedure. These are consequences which should not be permitted to occur without notice and hearing. There are no matters covered by the Natural Gas Act which are more substantive in nature than those relating to rate schedules and certificates. When its rate schedules were rejected and its certificates were vacated summarily, Petitioner was deprived of substantive rights substantially affecting the whole future course of the regulation of the gas sales involved. These can not be mere procedural rulings as to which notice and hearing requirements can properly be ignored.

Also essential to the conclusion of the Court below that the Commission was not obliged to grant notice and hearing prior to the issuance of its orders is the Court's statement that no fact question was involved (and, thus, only a question of law was present) and no evidence would have been material. Elsewhere in its opinion the Court concludes on

the merits that the Commission's orders should be affirmed because no injury to Petitioner has been shown and "none is threatened so far as it appears," the obvious inference being that upon a satisfactory showing of injury Petitioner would be entitled to have the Commission's orders set aside. Yet throughout the proceedings before the Commission Petitioner was consistently denied all opportunity for a hearing at which the elements of injury to Petitioner resulting from the proposed orders could be shown by evidence of the kind and quantity now seemingly required by the Court below. An adequate showing of injury requires a proper record made in the course of a conventional hearing, for the existence of injury to Petitioner, present and threatened, is clearly a fact question, despite the Court's ultimate conclusion that no fact question was involved. Moreover, the Court's opinion determines that such fact issue of injury is the critical issue in this case. In being deprived of a hearing Petitioner has been effectively deprived of the opportunity to meet this issue.

Petitioner's rate schedule and certificate application filings were made, not only in accordance with all of the substantive and formal requirements of the Natural Gas Act, but also in accordance with all of the pertinent general regulations of the Commission in effect at the time the filings were made. The opinion of the Court below views the issue involved as being, in part, whether the Commission has the authority to make *ad hoc* adjudications which are a departure from its general rules. The point is misconceived. The Commission's general authority to issue *ad*

hoc orders is not challenged here. The important point is that when an *ad hoc* adjudication is proposed which is in conflict with an existing general rule of the administrative agency on the same subject, particularly in the circumstances of this case, such an adjudication should not be permitted to occur without prior notice and hearing. And that conclusion is implicit in the principal authority cited by the Court below, *American Power & Light Company v. Securities and Exchange Commission*, *329 U. S. 90, 108 (1946)*. Again, this case is not concerned with an *ad hoc* change in a mere procedural rule, as the Court below suggests by citing *National Labor Relations Board v. Monsanto Chemical Company*, *205 F. 2d 763 (8th Cir. 1953)*, but is concerned rather with an *ad hoc* change in rule which has serious substantive consequences. Notice and hearing in advance should be required.

d. *The Orders Under Review Do Not Contain Adequate Findings and Conclusions.*

The Commission's orders under review are invalid for want of an adequate and proper statement of findings and conclusions. In this respect the orders are in conflict with the requirements of the Natural Gas Act, the Administrative Procedure Act, and the due process clause of the Fifth Amendment to the Constitution of the United States. The Court below failed in its opinion to consider the absence of proper findings and for that reason alone its judgments should be reviewed.

In the orders rejecting Petitioner's rate schedule filings the Commission found variously that Petitioner is not a

"signatory party" to a gas sale contract, that duplicate filings of gas sale contracts are not in the public interest, and that to permit duplicate filings "can only result in confusion." Similarly, but less elaborately, in the orders vacating certificates previously issued to Petitioner, the Commission found that Petitioner is not a "signatory party" to a gas sale contract, and that Petitioner is not a "proper party" to be issued a certificate. With such findings (together with references to orders, issued in other cases, which were no more complete) the Commission rejected Petitioner's rate filings and vacated its certificates.

The Commission's findings of fact in no way support its ultimate conclusion. The orders are absolutely devoid, among other things, of any findings or conclusions which in any way relate the findings actually made to the scope of the Commission's authority as to rate schedules under Section 4 of the Natural Gas Act or as to certificates under Section 7 of the Act. Nor do the findings made in any way lead to the conclusion that Petitioner's filings did not meet the formal requirements of the Act or the Commission's regulations, or that Petitioner is not entitled under the Act to make its own rate and certificate filings. A conclusion on such matters is essential to a determination of the validity of the Commission's orders. The basic reasoning of the Commission in the orders is so obscure as to amount to a denial of Petitioner's right to fair play and due process in the presentation of the issues.

The Natural Gas Act, as construed by this Court, requires clarity and completeness in the basic or essential

findings on which the Commission's orders rest. *Colorado-Wyoming Gas Company v. Federal Power Commission*, *324 U. S. 626, 634 (1945)*. Likewise applicable is Section 8(b) of the Administrative Procedure Act which requires that decisions of Administrative agencies shall include a statement of "findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record." But even absent specific statutory standards, the requirement of basic or essential findings is a guiding principle of procedural due process. *Securities and Exchange Commission v. Chenery Corporation, 318 U. S. 80 (1943)*.

In connection with the matter of inadequate findings in the Commission's orders, a matter not discussed in the opinion of the Court below, it should be pointed out that the Court below sustained the orders on a ground which was not invoked by the Commission. On the merits the principal basis expressed by the Court in its opinion is that "each of the sales here involved made by an operator under an operating agreement could be properly treated as a single jurisdictional sale of the unit or leasehold gas production, and that each such sales contract could properly be the subject of a single rate filing." This basis is nowhere expressed in the Commission's orders. The Commission in its orders has not disputed Petitioner's position that Petitioner is itself separately engaged in each instance in a jurisdictional sale of gas and that there is no single sale which includes both Petitioner's gas and the operator's gas. The Commission seemingly has merely postulated that

its rule-making power permits it to impose another party's filings upon Petitioner, despite the existence of Petitioner's separate jurisdictional sales. There is a vast difference between the basis thus expressed by the Court below and the only basis which can be gleaned from the Commission's orders. And the difference in basis involves a very substantial difference in the future course of regulation of the gas sales involved. If the Commission's basis is correct, Petitioner, even without its own rate schedules and certificates, may be subject to the jurisdiction of the Commission in other respects. On the other hand, if the Court's basis is correct, Petitioner is itself not engaged in jurisdictional gas sales and is not in the circumstances of this case a natural-gas company subject to the jurisdiction of the Commission, since the only gas sales involved are made by the operators, the Court said.

Petitioner submits that neither basis is a lawful one. But the important point here is that the reviewing court must judge the propriety of administrative orders solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the Court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. *Securities and Exchange Commission v. Chenery Corporation, 332 U. S. 194, 196 (1947), 318 U. S. 80 (1943); Colorado-Wyoming Gas Company v. Federal Power Commission, 324 U. S. 626, 634 (1945).* Since the Court below purported in its opinion to do just that—substitute a ground or basis different from that employed by the Commission—the Court's judgments should be reviewed.

e. The Commission Unlawfully Certified Documents Pertaining to Other Proceedings As Part of the Record Below

In each of four of the cases in the Court below the Commission certified to the Court as part of the record a mass of documents relating to the operator of the gas unit or the gas processing plant, to which certification Petitioner objected in each case by a Motion to Require Correction of Imperfect Record (Supp. R. 16020, 5; Supp. R. 16021, 9; R. 16410, 55).[3] The Commission filed objections to the motions (Supp. R. 16020, 13; Supp. R. 16021, 17; R. 16410, 62), and Petitioner responded to such objections (Supp. R. 16020, 17; Supp. R. 16021, 21; R. 16410, 69). In its opinion disposing of all of the cases the Court below denied the motions without discussion.

The documents which are the subject of Petitioner's motions to correct the record do not in any manner relate to Petitioner, and they were filed in proceedings to which Petitioner is not now and has never been a party. Such documents appear to relate only to the operator of the gas unit or gas processing plant involved in each case, none of which parties has ever been authorized by Petitioner to make any filing with the Commission or institute any proceeding in Petitioner's behalf. The documents involved can in no sense be considered a part of the formal record of Petitioner's proceedings before the Commission since there has never been a hearing in such proceedings in which such documents could have been introduced as evidence.

[3] In one case below, No 16548, the motion and the responses were not printed in the record.

The pertinent standard of the Natural Gas Act is contained in Section 19(b), providing, in part, that "the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered." The parallel provision of the Administrative Procedure Act is contained in Section 7(d) providing, in part, that "The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision * * *."

The operators' filings with the Commission and the related documents pertaining to those parties do not meet the standard of either statute. It is apparent on the face of the orders under review that those documents were not the "record upon which the order complained of was entered," since the only record in Petitioner's proceedings was made by Petitioner itself with its own filings and there has never been a hearing on the issues in this case at which other documents could have been made an additional part of the record. Moreover, those documents were obviously not "filed in the proceeding" before the Commission which resulted in the orders here under review, within the meaning of the Administrative Procedure Act.

Aside from the provisions of the statutes, it is submitted that in denying Petitioner's motions to correct the record and in denying, at the same time, Petitioner's right to notice and hearing, the Court below has reached an incongruous result which has the effect of depriving Petitioner of procedural due process. On the one hand, the Commission has been permitted to freely include in the records of the

cases in the Court below at its will voluminous filings of other parties in proceedings in no way related to Petitioner, without any requirement of hearing or any other procedure by which such evidence might be tested for relevance and accuracy. And on the other hand, Petitioner has been denied any semblance of hearing where it might have had a corresponding opportunity to present evidence bearing on these matters. In effect the Commission has introduced evidence into the record without the restriction inherent in the hearing procedure, while Petitioner has been denied a corresponding right to present evidence even with the restrictions of hearing procedure. In these circumstances the Court's denial of Petitioner's motions to correct the records should be reviewed.

II. Decision Below Conflicts With Applicable Decisions of This Court.

As already pointed out, in all of the fact situations involved here Petitioner filed applications for certificates which met all formal requirements of the Natural Gas Act and the Commission's regulations. In due course hearings were held on those applications and in each case a certificate was issued to Petitioner by an order containing all requisite factual and jurisdictional findings. It is submitted that the Commission thus exhausted its authority in the matters and had no further authority to vacate the certificates thus issued.

This Court, in *United States v. Seatrain Lines*, 329 U. S. 424 (1947), under analogous circumstances, had before

it the question of the validity of an order of the Interstate Commerce Commission revoking a certificate previously issued to a water carrier. This Court affirmed a District Court judgment setting aside the order, and held that under Part III of the Interstate Commerce Act (which, like the Natural Gas Act, is based on Part I of the Interstate Commerce Act) the Interstate Commerce Commission is without power to revoke a certificate. The Court commented that it need not determine the Commission's statutory power to correct mistakes because it was apparent that the issuance of the original certificate was not an "inadvertent" error which the Commission's subsequent action was intended to correct, but rather the subsequent revocation was for the purpose of executing a new policy announced in another proceeding.

In this case likewise the Commission is without specific authority in the Natural Gas Act to revoke a certificate previously issued and, therefore, does not possess such authority. And in this case likewise, even if the authority to correct clerical or inadvertent errors is implied, it is apparent from the record that the purported vacation of Petitioner's certificates was not to correct an "inadvertent" error but to execute a new policy. This Court has held in the *Seatrain* case that the Commission does not have such authority after the certificates have been issued and the matters have been closed. The opinion of the Court below is, therefore, in conflict with the *Seatrain* decision and should be reviewed.

It is submitted that the opinion of the Court below is also in conflict with the decision of this Court in *United Gas Pipe Line Company v. Mobile Gas Service Corporation, 350 U. S. 332 (1956)*. The Court below has held as the principal basis for its affirmance of the Commission's orders that "each of the sales here involved made by an operator under an operating agreement could be properly treated as a single jurisdictional sale of the unit or lease-hold gas production, and that each such sales contract could properly be the subject of a single rate filing." Yet each sale of Petitioner's gas here involved is a separate sale made by Petitioner, either as the principal acting through an agent or directly under a gas sale contract in which it was assigned an interest. This Court held in the *Mobile* case that a natural-gas company may devise rates by contract arrangements of its own choosing and that the Natural Gas Act contemplates rates schedules thus initiated by the natural-gas company itself, not by the Commission. Petitioner acted in strict accordance with the principles of *Mobile* in making its rate schedule filings here involved. Under the circumstances, the Act provides for no discretion on the part of the Commission to treat multiple gas sales as a single jurisdictional sale of gas for purposes of regulation, but instead requires separate treatment of each gas sale subject to the jurisdiction of the Commission. In its holding to the contrary the opinion of the Court below is in conflict with the decision of this Court in the *Mobile* case, and the judgments of the Court below should, therefore, be reviewed.

CONCLUSION

For the reasons hereinabove set forth it is urged that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

Nos. 16020, 16021, 16213, 16321, 16410 and 16548

SUN OIL COMPANY,

Petitioner,

versus

FEDERAL POWER COMMISSION,

Respondent.

Petitions for Review of Orders of the Federal Power Commission, sitting at Washington, D. C.

(May 9, 1958.)

Before TUTTLE, JONES and WISDOM, Circuit Judges.

JONES, Circuit Judge: These six cases arise from similar fact situations and present substantially the same issues of law. They were argued together and one opinion will dispose of all of the cases. The problems presented are among those following the decision in *Phillips Petroleum Co. v. Wisconsin*, 347 U. S. 672, 74 S. Ct. 794, 98 L. Ed. 1035, 3 P U R 3d 129. There it was held that sales made in interstate commerce of natural gas of independent producers are subject to regulation by the Federal Power Commission under the Natural Gas Act. 52 Stat. 821, 15 U. S. C. A. § 717 et seq. The methods followed and the

steps taken by the Commission in fashioning procedures for this extension of its regulatory activities are outlined in *Magnolia Petroleum Company v. Federal Power Commission*, 5th Cir. 1956, 236 F. 2d 785, 15 P U R 3d 364, cert. den. 352 U. S. 968, 77 S. Ct. 356, 1 L. Ed. 2d 322.

By the Natural Gas Act it is provided that, under such rules and regulations as the Commission may prescribe, every natural-gas company shall file schedules showing its rates and charges with related data and all contracts affecting or relating to the rates, charges, classifications and services. 15 U. S. C. A. 717c(c). Every natural-gas company subject to regulation is required to procure from the Commission a certificate of public convenience and necessity before doing business. Those engaged in transportation or sale of natural gas on February 7, 1942, the effective date of an amendment to the Act, were entitled to certificates, upon application, as to the routes of transportation or within the area of sales existing on that date. 52 Stat. 825, as amended by 56 Stat. 83, 15 U. S. C. A. 717f(c). The rules and regulations of the Commission for the administration of the Act were designed primarily to cover pipe line transportation of natural gas. They were neither designed for nor adapted to the regulation of independent producers. To provide procedures applicable in the field of regulating independent producers the Commission issued its so-called No. 174 series of orders. See *Magnolia Petroleum Co. v. Federal Power Commission, supra.*

Involved in Case No. 16020 is the pooled gas unit of 659.44 acres in the Carthage Field, Panola County, Texas.

and known as Carthage Unit No. 16. Sun Oil Company, the petitioner, hereafter referred to as Sun, owned a 12.89% interest. Stanolind Oil and Gas Company owned a 42.72% interest and two other oil companies owned the remaining interests. On October 5, 1946, these four companies executed an operating agreement under which Stanolind was designated as the operator and as such was given charge of the drilling, development and producing operations for the production of gas in the unit area. Each party was given the right to take its share of production in kind. If any party did not exercise the right to take its share of the gas in kind, or of separately disposing of such gas, the operator was given "charge and control of the marketing of such production."[1] Stanolind and other oil and gas companies made an amended contract on July 1, 1952, for the sale to Texas Gas Transmission Corporation of gas from eleven units in the Carthage Field, including Carth-

[1]The agreement provisions are:

"In the event that any Non-Operator does not exercise its right to take its share of gas in kind or of separately disposing of such gas, Operator shall have charge and control of the marketing of such production, and all of such production, whether sold to third parties or delivered to one of the parties hereto, shall be sold or delivered pursuant to sales contracts and division orders executed by the parties participating in such sales and deliveries. In the event any party not electing to take its share of production in kind fails or refuses to execute a sales contract and division order, which have been executed by other parties hereto, the Operator shall have the right to sell such party's production along with that of the other parties under said sales contract until such party shall either (1) make arrangements for other disposition of its share of gas at the wellhead and furnish Operator sufficient advance, written notice to enable Operator to give effect to such arrangement, or (2) execute a sales contract and division order already executed by other parties. At such times as any of the gas production from the Unit Area is being sold to third parties, each of the parties hereto shall be entitled to receive its proportionate part of the purchase price for such production direct from the purchaser. At such times as any Non-Operator is not taking its share of production in kind, Operator shall have the right to purchase such production for its own account at not less than the prevailing market price and shall account to Non-Operators therefor."

age Unit No. 16. Sun was not a party to this sales contract and did not sign it. Sun was not referred to in the body of the contract but was designated as the owner of its 12.89% of Unit 16 in an exhibit referred to in and forming a part of the contract.

In Case No. 16021 Sun was the owner of a 40.068% interest in the Sun-Sallie J. Neal "A" Unit of 467.93 acres in Panola County, Texas. Sun is designated as the operator under the operating agreement. Sun authorized The Chicago Corporation to sell the gas from the well on the Unit to Tennessee Gas Transmission Company under a contract to which Sun is not a party and which Sun did not sign.

Case No. 16213 involves the Richardson Unit in Panola County, Texas. It includes 662.52 acres. Sun owns 17.7142% of the Unit. The operating agreement designated R. Lacy, Inc. as the operator and provided that the sales of gas should be made to Lone Star Gas Company under a prior contract to which reference was made. Sun was not a party to nor a signer of the contract with Lone Star Gas Company.

In case 16410 the questions arise by reason of the so-called Miami "C" Lease on 640 acres in the South Pecan Lake Field in Cameron Parish, Louisiana. Sun had a 12.5% interest in the lease. Pan American Production Company, owning 50% of the lease, was the operator under an agreement of the holders of the lessee interests. Pan American had a contract to sell and deliver gas to United Fuel Gas Company. Pan American had committed its share of gas from the Miami "C" Lease to this contract. Sun, by

letter agreement of October 1, 1954, authorized Pan American to dedicate Sun's gas to the United Fuel Gas contract, to deliver its gas and include it under the billings under the sales contract and to receive and remit to Sun its share of the proceeds.[1] Under this authorization sales were made.

The Commission's Order 174 required, among other things, that independent producers file their existing rate schedules and make no rate changes until after filing proposed changes (which the Commission might suspend pending a hearing), and required independent producers to apply for and obtain certificates of public convenience and necessity covering their sales of gas which were subject to regulation by the Commission. The Commission's Order 174 was superseded by its Order 174-A. Stanolind made rate schedule filings with respect to the sales of gas from Carthage Unit No. 16; Chicago Corporation filed rate schedules as to the Neal "A" Unit; R. Lacy, Inc. made a rate schedule filing covering the sales of gas from the Richardson Unit; and Pan American filed schedules covering the rates on the Miami "C" Lease gas sales. Sun also made rate schedule filings covering its interests in the several sales transactions, and also filed rate increase schedules. The Commission accepted these filings made by Sun. Sun applied for certificates of public convenience and necessity covering the sales of gas from each of the units or

[1] In this letter agreement it was stated:

"It is understood that Sun will retain its own responsibility for the handling of matters with the Federal Power Commission under the terms of the Natural Gas Act and Order 174-A, as same may be amended and modified, arising out of the disposition of its gas hereunder."

leases here involved. Certificates were granted on December 15, 1954, October 20, 1955, and May 28, 1956.

The practices herein outlined of effecting sales to pipeline companies of natural gas produced under unitized and pooled operations were common and prevailed generally throughout the industry. A single contract for the sale of gas might produce several, perhaps many, rate schedule filings. This condition not only added substantially to the increased burden of handling and processing by the Commission and its staff, but caused confusion and complications which the Commission regarded as impairing its efficiency and as unnecessary in carrying out the duties imposed upon it by the Act. On December 16, 1954, the Commission issued its Order 174-B. By this order the Commission provided that rate filings and applications for certificates of public convenience and necessity "may be made" by the unit operator where one or more wells are under co-ownership or where a group of producers are unitized for production or sale. It was also provided by Order 174-B that where filings were made by the operator, the other parties to the operating arrangement "need not file hereunder." This did not seem wholly to solve the problem so far as the Commission was concerned for on May 5, 1955, it issued its order in a proceeding involving Midstates Oil Corporation and other gas producers who had not signed the contracts pursuant to which gas in which they had an interest was being sold. These producers, as well as the "operators" filed supplemental rate schedules. The Commission found that the public interest did not

require and there was no substantial basis or justification for duplicate filings and the supplemental rate schedule filings of the non-operating producers were rejected. A prior order of similar import had been issued by the Commission on March 10, 1955, in a case involving Humble Oil & Refining Co.

On September 27, 1956, the Commission issued its Order 190, 18 C. F. R. §§ 154.91, 157.23(c), which amended and supplemented Order 174-B. Among other things Order 190 provided that operators who had signed contracts for the sale of gas produced or processed should make rate schedule filings with respect to such sales and should make applications for certificates, that co-owners of the gas pro-

The reasons for its order were thus stated by the Commission:

"Thus, Midstates, Cities Service Oil Company, and Forest are not signatories to the above-described certain contracts and Garrett, Midwest, Rudman and Wood concur in but are not signatories to the above-described certain contracts. Question arises as to whether, in the reasonable administration of the Natural Gas Act such persons subject to the provisions of that Act who have not signed basic contracts between sellers and purchasers, as described above, should be permitted or required to file, or adopt by concurrence as its rate schedule the basic contract between seller and purchaser. No substantive rights of such persons, who are not signatories to such contracts, under the sales contracts in question are affected to their detriment or disadvantage if the basic filing by the operators are taken as the filings of the independent producers. Nor are the interests of the purchasers affected in any way since there can be no abandonment of service other than in the manner provided by the Natural Gas Act. It therefore, appears reasonable and proper in the public interest to limit rate filings so that the basic contract for sale and purchase may be taken as the rate schedule affecting all persons whose gas is sold under such basic contracts. Under the above-described contracts no person who is not a party to any of the basic contracts can effect a change in price under any of the basic contracts. We can find no good reason for permitting Midstates, Cities Service Oil Company, Midwest, Forest, Garrett, Rudman and Wood to make filings, which are included in filings made by the sellers under the basic contracts, when the only possible effect would be to show on their own behalf the difference in volume of gas to which the rate schedule would be applicable as to each."

duced who had signed the sales contract may, but need not, make filings, and that co-owners who had not signed the sales contract may not file rate schedules.

On November 30, 1955, the Commission wrote a letter to Sun. In it reference was made to the Midstates order and the conclusions there reached. By the letter the rate schedule filings previously made by Sun which related to Carthage Unit 16 were rescinded and supplemental rate schedules were rejected. Sun made an application for a rehearing. The Commission, on January 27, 1956, denied the application by an order stating that the application presented no question of fact or principle of law not considered by the Commission when it issued its letter. In Case No. 16020 we are asked to review the Commission's actions of November 3, 1955, and January 27, 1956. Like action was taken as to Sun's rate schedule filings relating to the Neal "A" Unit and these are before us in Case No. 16021. The same steps were followed with respect to the Richardson Unit and the correctness of the Commission's action comes to us in Case No. 16213. The procedures followed and the form of orders entered with respect to the Miami "C" Lease were somewhat different than in the other situations but the petition for review of the Commission's action presents, in Case 16410, the same questions as are raised in the other cases.

On June 15, 1956, the Commission vacated its order granting a certificate of public convenience and necessity

to Sun on the Unit 16 gas sales and the certificate was cancelled. The basis for the order was that participants in unit operations who were not parties to the contracts under which sales were made were not entitled to certificates. Sun made an application for a rehearing of this order which the Commission denied. Sun, in Case 16321, seeks a reversal of the Commission's ruling. The Commission took similar action in cancelling the certificates which it had issued to Sun on the Neal "A" Unit, the Richardson Unit and the Miami "C" Lease. Its orders relating thereto are before us for review in Case No. 16548.

Sun presents both substantive and procedural questions. It contends that it is a natural-gas company and as such is under a duty and has a right to procure certificates of public convenience and necessity and make filings of rate schedules; that there is no justification for a distinction between those who have signed and those who have not signed a contract for the sale of natural gas, and in reaching a contrary determination the Commission exceeded its powers and abused its discretion; and that the cancellation of the rate schedule filings and the certificates without a hearing and notice to Sun was violative of due process requirements, the Natural Gas Act and the Administrative Procedure Act.

Pertinent to the inquiry we are to make are the provisions of the Natural Gas Act defining a natural-gas com-

pany,' requiring the filing of rate schedule, requiring the procurement of certificates of public convenience and necessity," and authorizing the making of regulations by the Commission.'

It may be noted that it is the *sale* of natural gas which is affected with a public interest, it is a person engaged in the *sale* that is a natural-gas company, and it is the rates

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"'Natural-gas company' means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale. 15 U. S. C. A. § 717a(6).

"'Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission within such time (not less than sixty days from June 21, 1938) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications and services." 15 U. S. C. A. § 717c(c).

"'No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: * * *." 15 U. S. C. A. § 717f(c).

"'The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules and regulations as it may find necessary or appropriate to carry out the provisions of this act. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this act; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours." 15 U. S. C. A. § 717o.

which are charged for or in connection with *sales* that must be just and reasonable and which must be filed. The gas which was produced by or on behalf of Sun—gas of which it had ownership—was commingled with the gas of others. Its ownership was of an undivided share of the whole. It could have had its share severed from the mass and then made a sale or other disposition of it. It could have made a separate sale of its undivided portion of the gas. Sun did neither of these things. Instead, in each case it joined with its co-owners in an agreement which either authorized the making of a contract of sale or ratified a contract of sale of all of the gas production from the particular unit or lease. In no instance was Sun a party to the contract of sale and in no instance did Sun execute the contract of sale. The Commission has stated that it would be burdened with an unmanageable mass of rate schedule filings if every person with an undivided interest in the gas production from a unit or lease operation should file. In the cases before us involving four sales contracts there were sixteen ownership interests. The rule-making power given to the Commission by Congress is ample to permit the Commission to make rules, regulations and orders appropriate to carry out the provisions of the Act. The necessity for classifications is recognized. No injury to Sun has been shown as the result of the rejection of its rate schedule filings or the cancellation of its certificates of public convenience and necessity. None is threatened so far as appears. There is no need to anticipate an injury not presently threatened and not shown to be something likely

to arise in the future. Cf. *Montana-Dakota Utilities Co. v. Federal Power Commission*, 8th Cir. 1948, 169 F. 2d 392, cert. den. 335 U. S. 853, 69 S. Ct. 82, 93 L. Ed. 401. The rate filings required by the Act are to be made under such rules and regulations as the Commission may prescribe. 15 U. S. C. A. § 717c(a). We think that the Commission would not have exceeded its powers if it had restricted rate schedule filings of gas sales from a unitized or leasehold operation to the operator who, for the various co-owners and with their authority, made a contract of sale. That the Commission permits, without requiring, a duplicate filing by a non-operator signer owning an undivided share would not furnish a non-operator non-signer a ground for complaint as to the denial of a right to file in the absence of any showing that the classification was one which resulted in an injury to him. We agree with the Commission that each of the sales here involved made by an operator under an operating agreement could be properly treated as a single jurisdictional sale of the unit or leasehold gas production, and that each such sales contract could properly be the subject of a single rate filing. The same conclusion also applies to the applications for and granting of certificates of public convenience and necessity.

The Commission, in its efforts to develop procedures and classifications which would permit it to process the volume of proceedings suddenly arising pursuant to the Phillips decision, moved from the ad hoc determinations in Midstates and Humble to its Order 190 which codified the rule of single filings. The action of the Commission in rescind-

Sun's rate schedule filings was subsequent to the Mid-[illegible]s' determination but prior to the issuance of Order [illegible]0. However the Commission had given notice, on March 23, 1955, prior to rescinding Sun's filings, that it proposed to make a rule to prohibit or restrict duplicate filings. The ad hoc process of development of administrative procedures is not an improper one. *American Power & Light Company v. Securities and Exchange Commission*, 329 U. S. 90, 67 S. Ct. 133, 91 L. Ed. 103; *Securities and Exchange Commission v. Chenery Corporation*, 332 U. S. 194, 67 S. Ct. 1575, 91 L. Ed. 1995, reh. den. 332 U. S. 783, 68 S. Ct. 26, 92 L. Ed. 367. Sun, however, contends that where a formal rule has been promulgated, such as Order 174-B which permitted non-signing owners of gas interests to file rate schedules, the Commission could not, by an ad hoc order deprive it of that which the formal rule had given it, particularly where the order is entered without notice and without a hearing. But an administrative agency is not a slave of its rules. *National Labor Relations Board v. Grace Co.*, 8th Cir., 1950, 184 F. 2d 126. Ad hoc changes may be made and, in proper cases, may be applied retroactively. *National Labor Relations Board v. National Container Corp.*, 8th Cir. 1954, 211 F. 2d 525. In a particular case an administrative agency may relax or modify its procedural rules and its action in so doing will not be subjected to judicial interference in the absence of a showing of injury or substantial prejudice. *National Labor Relations Board v. Monsanto Chemical Company*, 2nd Cir. 1953, 205 F. 2d 763.

The effect of the Commission's orders of which Sun complains was substantially to reduce multiple rate filings by the elimination of filings by non-operators who had not signed the contract by which the gas, owned in part by them, was sold. Sun asserts that it has been deprived of rights of substance and that the deprivation has worked to its detriment and injury. The authorizing by it of the sale by an operator of its undivided share of gas does not, it contends, justify the Commission in denying Sun the right to make its own filings and initiate or resist proposed rate changes. It suggests that it would be harmed by the failure of its operator to file rate schedules or rate changes or by the untimely filings by the operator. Sun urges that its proper rate formulae and the elements of which they are comprised may be different from those of the operator. Sun assumes that it might not be notified by either the Commission or the operator of proceedings or proposals by which it might be adversely affected. It believes that if it had notice or knowledge of a proposal or proceeding by which it might be adversely affected, it might not be permitted to assert its rights and claims by being allowed to intervene. Sun takes the position that although the operating agreements give it the right to sever and take in kind its share of gas and to make separate sales of it, the Commission's rescissions of its separate filings deprive it of this express contractual right. The ruling of the Commission requiring filings only by operators and permitting filings by other co-owners only if they were signers of sales contracts was a procedural ruling and it was no less so

when the ruling, as to Sun, was made in specific orders rescinding its separate duplicate filings. It is not shown that the ruling has been or that it will be the means by which the substantial rights of the owners of gas, the sale of which is subject to regulations, will be adversely affected. We are unwilling to assume that the operators will advance their own interests to the prejudice of a non-operator co-owner. We do not believe that Sun will be without notice or knowledge of any proposed action which might affect its interests. We do not have any fear that the Commission will abuse its discretion by denying Sun the right to intervene in any proceeding where its rights of substance are involved and might be prejudiced if it were deprived of the right to participate. We cannot see that Sun is deprived of any contractual right reserved to it under the operating agreements. The regulations generated by Order 190 contain these provisions:

> "• • • the non-signatory co-owner whose gas is being sold by the operator may, where he has reserved the right to do so, elect to take his gas in kind and dispose of it otherwise if and when there has first been obtained authorization therefor to the extent required by sections 7(b), and 7(c), or other applicable provisions of the Natural Gas Act, and filings have been made as required by section 4 thereof." 18 C. F. R. § 154.91(d).

We are unable to see any harm, injury or prejudice to Sun resulting from the Commission action which is here under attack.

We come then to the final question of whether the failure of the Commission to give Sun notice and hold formal hearings before rescinding its rate schedule filings and canceling its certificates of public convenience and necessity requires the setting aside of the Commission's orders. Although Sun urges to the contrary, we do not think there was any fact question involved and hence no evidence would have been material. If the question was more than a question of administrative policy, and we doubt that it was, it was a question of law. We do not believe there was a case of an adjudication which was required by the statute "to be determined on the record after opportunity for an agency hearing" where notice is required by the Administrative Procedure Act. 5 U. S. C. A. § 1004. Nor do we think that the absence of notice has deprived Sun of due process as guaranteed by the Constitution. The only benefit that would have inured to Sun by notice and hearing would have been the privilege of making a legal argument before the Commission. We find no requirement in the Natural Gas Act for notice and hearing in such a situation. The opportunity to be heard on questions of law is not an inherent element of procedural due process in the determination of a procedural question. Cf. *Federal Communications Commission v. WJR, The Goodwill Station, Inc.*, 337 U. S. 265, 69 S. Ct. 1097, 93 L. Ed. 1353.

Sun has filed a motion in each of the cases numbered 16020, 16021, 16410 and 16548 to correct the record. Without extending this opinion for a discussion of the motions, we will merely say that they are not well founded and are denied.

The Commission acted within its powers; its orders which are under review were proper and are

AFFIRMED.

A true copy.
Test: /s/ EDWARD W. WADSWORTH
EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit
New Orleans, Louisiana
(Seal).

JUDGMENT

Extract from the Minutes of May 9, 1958.

No. 16020

SUN OIL COMPANY

versus

FEDERAL POWER COMMISSION

This cause came on to be heard on the petition of Sun Oil Company for a review of an order of the Federal Power Commission issued on November 30, 1955 in FPC Gas Rate Schedule No. 56 and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the order of the said Federal Power Commission under review in this cause be, and the same is hereby, affirmed.

JUDGMENT

Extract from the Minutes of May 9, 1958.

No. 16021

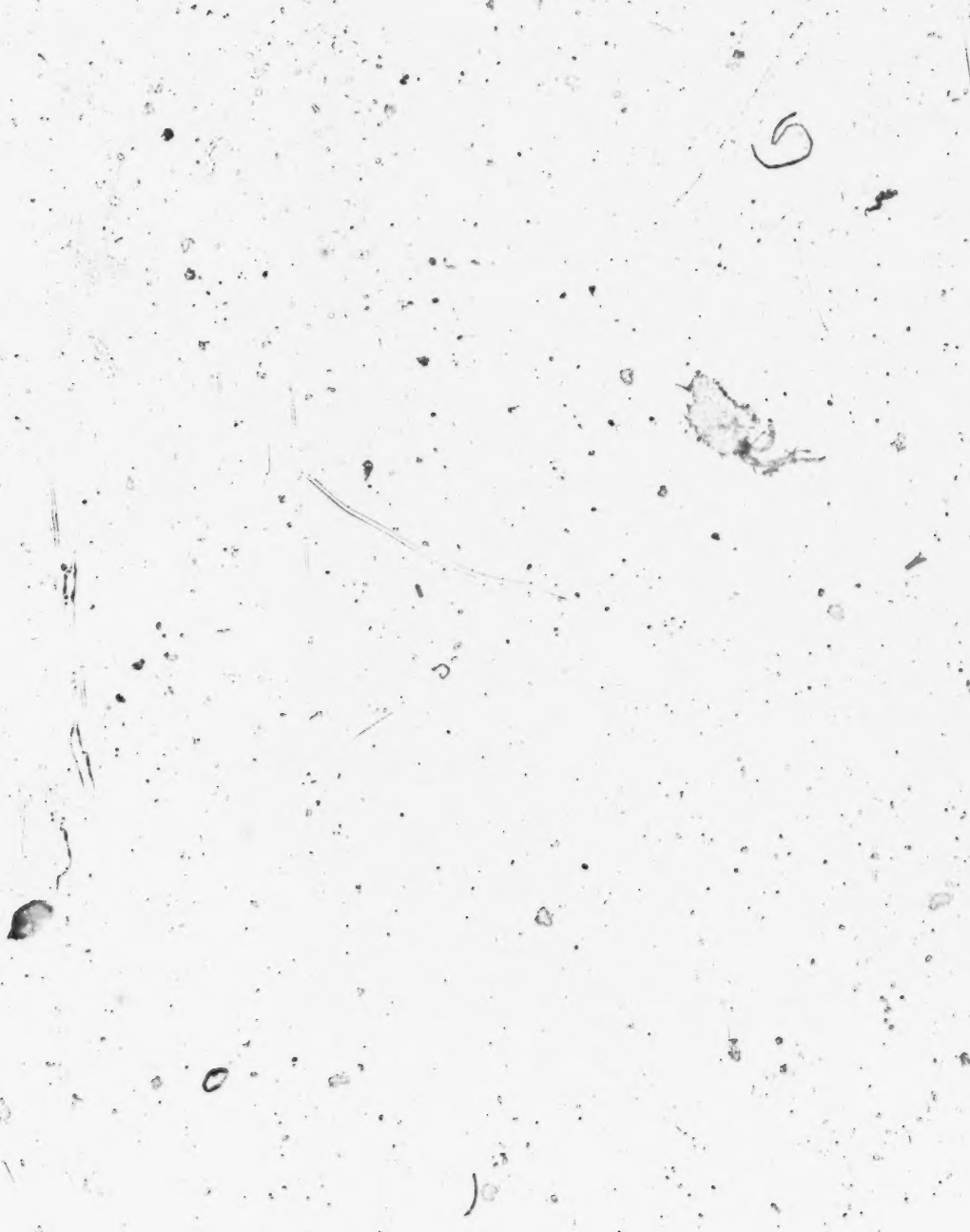
SUN OIL COMPANY

versus

FEDERAL POWER COMMISSION

This cause came on to be heard on the petition of Sun Oil Company for a review of an order of the Federal Power Commission issued on December 9, 1955 in FPC Gas Rate Schedule No. 34, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the order of the said Federal Power Commission under review in this cause be, and the same is hereby, affirmed.



JUDGMENT

Extract from the Minutes of May 9, 1958.

No. 16213

SUN OIL COMPANY

versus

FEDERAL POWER COMMISSION

This cause came on to be heard on the petition of Sun Oil Company for a review of an order of the Federal Power Commission issued on March 23, 1956 in FPC Gas Rate Schedule No. 52, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the order of the said Federal Power Commission under review in this cause be, and the same is hereby, affirmed.

JUDGMENT

Extract from the Minutes of May 9, 1958.

No. 16321

SUN OIL COMPANY

versus

FEDERAL POWER COMMISSION

This cause came on to be heard on the petition of Sun Oil Company for a review of an order of the Federal Power Commission issued on June 15, 1956, in Docket No. G-6655, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the order of the said Federal Power Commission under review in this cause be, and the same is hereby, affirmed.

JUDGMENT

Extract from the Minutes of May 9, 1958.

No. 16410

SUN OIL COMPANY

versus

FEDERAL POWER COMMISSION

This cause came on to be heard on the petition of Sun Oil Company for a review of orders of the Federal Power Commission issued on August 21, 1956 and September 10, 1956, in Docket Nos. G-8615 and G-10173, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the orders of the said Federal Power Commission under review in this cause be, and the same are hereby, affirmed.

JUDGMENT

Extract from the Minutes of May 9, 1958.

No. 16548

SUN OIL COMPANY

versus

FEDERAL POWER COMMISSION.

This cause came on to be heard on the petition of Sun Oil Company for a review of an order of the Federal Power Commission issued on November 21, 1956, in Docket Nos. G-4350, G-6653 and G-6657, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the order of the said Federal Power Commission under review in this cause be, and the same is hereby, affirmed.

ORDER DENYING REHEARING

Extract from the Minutes of June 11, 1958.

Nos. 16020, 16021, 16213, 16321, 16410 and 16548

SUN OIL COMPANY

versus

FEDERAL POWER COMMISSION

It is ordered by the Court that the petition for rehearing filed in these causes be, and the same is hereby, denied.

EXCERPTS FROM THE NATURAL GAS ACT.

SEC. 2. When used in this act, unless the context otherwise requires—

(1) "Person" includes an individual or a corporation.

(2) "Corporation" includes any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, receiver or receivers, trustee or trustees of any of the foregoing, but shall not include municipalities as hereinafter defined.

(3) "Municipality" means a city, county, or other political subdivision or agency of a State.

(4) "State" means a State admitted to the Union, the District of Columbia, and any organized Territory of the United States.

(5) "Natural gas" means either natural gas unmixed, or any mixture of natural and artificial gas.

(6) "Natural-gas company" means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.

(7) "Interstate commerce" means commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States.

(8) "State commission" means the regulatory body of the State or municipality having jurisdiction to regulate rates and charges for the sale of natural gas to consumers within the State or municipality.

(9) "Commission" and "Commissioner" means the Federal Power Commission, and a member thereof, respectively. [52 Stat. 821 (1938); 15 U. S. C. § 717a]

* * * * *

SEC. 4.

* * * * *

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and

keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided*, That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may

make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [52 Stat. 822 (1938); 15 U. S. C. § 717e]

SEC. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-

gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however*, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

* * * * *

SEC. 7

* * * * *

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefore, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certifi-

cate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however*, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however*, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certifi-

cate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U. S. C. § 717f (c)]

(d) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require. [56 Stat. 84 (1942); 15 U. S. C. § 717f (d)]

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable

terms and conditions as the public convenience and necessity may require. [56 Stat. 84 (1942); 15 U. S. C. § 717f (e)]

* * * * *

SEC. 16. The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this act. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this act; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours. [52 Stat. 830 (1938); 15 U. S. C. § 717o]

* * * * *

* * * * *

(b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, ~~shall be conclusive.~~ If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that

there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code as amended (U. S. C., title 28, secs. 346 and 347).

* * * * *

EXCERPTS FROM THE ADMINISTRATIVE PROCEDURE ACT

7. Hearings.—In hearings which section 4 or 5 requires to be conducted pursuant to this section—

* * * * *

(d) Record.—The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 8 and, upon payment of lawfully prescribed costs, shall be made available to the parties. Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary. [June 11, 1946, c. 324, §7, 60 Stat. 241; 5 U. S. C. §1006.]

* * * * *

8. Decisions.—In cases in which a hearing is required to be conducted in conformity with section 7—

* * * * *

(b) Submittals and decisions.—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed

findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof. [June 11, 1946, c. 324, §8, 60 Stat. 242; 5 U.S.C. §1007.]

* * * * *

9. Sanctions and powers.—In the exercise of any power or authority—

(a) In general.—No sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency and as authorized by law.

(b) Licenses.—In any case in which application is made for a license required by law the agency, with due regard to the rights or privileges of all the interested parties or adversely affected persons and with reasonable dispatch, shall set and complete any proceedings required to be conducted pursuant to sections 7 and 8 of this Act or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, no withdrawal, suspension, revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant

such action shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements. In any case in which the licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire until such application shall have been finally determined by the agency. [June 11, 1946, c. 324, §9, 60 Stat. 242; 5 U. S. C. §1008.]

EXCERPT FROM THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

No person shall * * * be deprived of * * * property, without due process of law; nor shall private property be taken for public use, without just compensation.

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

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FILED
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JAMES R. BROWNING, Clerk

No. 335

In the Supreme Court of the United States

OCTOBER TERM, 1958

SUN OIL COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

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BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The orders of the Federal Power Commission (R. 16020, p. 61; R. 16021, p. 216; R. 16213, p. 116; R. 16321, p. 104; R. 16410, p. 225; R. 16548, pp. 82, 238, 494)[1] are not reported. The opinion of the Court of Appeals (Pet. App. 37-53) is reported at 256 F. 2d 233.

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[1] References are to the respective printed records filed in the separate cases in the Court of Appeals. See *infra*, p. 8, fn. 8.

JURISDICTION

The judgments of the Court of Appeals were entered on May 9, 1958, (Pet. App. 55-65). Petitions for rehearing, timely filed, were denied June 11, 1958 (Pet. App. 67). The petition for a writ of certiorari was filed September 4, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act (15 U.S.C. 717r (b)).

QUESTIONS PRESENTED

1. Whether the Natural Gas Act precludes the Federal Power Commission from treating as one jurisdictional sale of natural gas, for rate-filing and certification purposes, a sale of gas from a joint operating unit made pursuant to a single sales contract with a single set of conditions, point of delivery, term, and price.

2. Whether petitioner was entitled to a formal hearing on Federal Power Commission orders which applied a general procedural rule to its rate-filings and certificate applications, where petitioner raised no issues of fact in seeking rehearing of the orders.

STATUTE INVOLVED

The applicable provisions of the Natural Gas Act are set forth in petitioner's appendix at pp. 69-78.

STATEMENT

The petition attacks a general procedural rule adopted by the Federal Power Commission prohibiting duplicating gas-rate filings and duplicating certificates of convenience and necessity governing sales

made by independent natural gas producers from jointly operated gas producing and selling "units". The history of the proceedings can be briefly summarized.

1. *The Commission's unit filing rule.*—Following this Court's decision in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, holding the independent natural gas producers subject to regulation under the Natural Gas Act, the Federal Power Commission issued new regulations (18 CFR 154.91, *et seq.*, 157.23, *et seq.*) establishing rate-filing and certification procedures especially adapted to the needs and requirements of the gas production industry.[2]

These regulations did not at first take adequate account of the general industrial practice of producing and selling natural gas through various types of "unitized" operating agreements which provide for the joint production and marketing of gas owned or assigned to more than one leasehold interest. Such agreements (four of which are involved in this case) designate one interest-holder as the "operator" who is responsible for producing and marketing the unit gas.[3] The operator enters into a single sales contract with an interstate pipeline—a sales contract which results in the transfer of the entire ownership interest in the

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[2] The Commission's pre-existing regulations had been designed for natural gas pipe lines and hence were poorly adapted to the needs of gas production. See *Magnolia Petroleum Co.* v. *F.P.C.*, 236 F. 2d 785 (C.A.5), certiorari denied, 352 U.S. 968.

[3] The other leaseholders are usually referred to as "non-operators".

unit-produced gas by one sale with a common point of delivery, set of conditions, term, and price. The "non-operator" participants, such as petitioner in this case, usually do not sign or become parties to these contracts. The gas of each leaseholder-participant is not separated in production but is sold as an undivided interest, each leaseholder being compensated by the operator in proportion to his leased acreage dedicated to the unit (see Pet. App. 37-43, 47).

Since unitized production is common in the natural gas industry, and unit sales contracts cover the gas of as many as one hundred distinct leasehold interests, the Commission following *Phillips* was confronted with the possibility that a large number of non-operator interest holders might regard themselves as compelled by Section 4 and Section 7 of the Natural Gas Act (15 U.S.C. 717c, 717f, Pet. App. 70, 73) to file duplicating rate filings and certificate applications governing what was in each case legally and economically a single sale of gas. Such duplication of the operator's filings would have burdened the gas producers themselves and made the Commission's task of bringing the production industry under regulation much more difficult (Pet. App. 42). The Commission's original producer regulations took account of this problem by providing (Order No. 174-B, December 16, 1954, 19 F.R. 8807) that a unit operator (who was the seller under the sales contract) could file rate schedules and obtain certification of the whole unit sale on behalf of all of the various non-operator participants, and that the non-operators "need not file" duplicating schedules or certificate applications.

As this regulation was permissive only, it did not prevent the filing of a large number of duplicating rate schedules and conflicting or duplicating certificate applications, a number of which were granted by the Commission in the course of disposing of the mass of applications which followed issuance of the producer regulations.[4]

When it became apparent that some uniform, non-duplicating filing and certificate procedure was an imperative for good regulation, the Commission in March 1955 (20 F.R. 2090) called for industry comment on a proposed rule which would permit only signatories of unit sales contracts (*i.e.*, operators) to to make filings and obtain certification of unit sales (Pet. App. 49). Petitioner was virtually the only large gas producer which did not comment on the proposed rule. Inasmuch as the great majority of the producers favored the proposed rule and the Commission anticipated no possibility of any injury resulting from it, the Commission amended its regulations in October 1956 to require only the signatory operators[5] to file rate schedules and obtain certificates which

[4] Prior to the producer regulations, the Commission annually had handled approximately 700 pipeline rate filings. In the first year following *Phillips*, the Commission, with virtually the same staff, was required in addition to process over 10,000 independent producer filings. F.P.C. Annual Report, Fiscal Year 1955, p. 108.

[5] The regulation permitted signers of unit sales contracts other than operators to file, in order to meet the occasional situation (*e.g.*, R. 16021, pp. 51-53, 237) where a signing party other than the operator was designated as sales agent for the unit. No substantial amount of duplicate filing has resulted from this provision.

would govern the entire unit sale, and to prohibit filings by non-signatories of the sales contract (Order No. 190, 18 CFR 154.91, 157.23 (c); Pet. App. 43, 51).

2. *The proceedings before the Commission and the court below.*—Following its notice of rule making in March 1955, the Commission, pending the outcome of the formal rule-making proceeding, had adopted the policy of uniformly rejecting filings and certificate applications made by non-signers of unit sales contracts,[6] when and as it became aware that the filings and applications duplicated or would duplicate identical filings and applications made by the operator-sellers (Pet. App. 42-43).

At the time when the Commission issued its regulations governing producer filings in July 1954, and while the foregoing policy was in effect, petitioner was an interest holder in four gas operating units, the gas of which, pursuant to agreement, was being sold by the unit operators (Stanolind Oil and Gas Company, The Chicago Corporation, R. Lacy, Inc., and Pan-American Production Company, respectively) to four interstate pipeline companies in four sale contracts (Pet. App. 38-41). Petitioner was not a signer of any of the contracts, which transferred in four separate sales its undivided interest in the gas pro-

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[6] This policy was announced formally in *Midstates Oil Corp.*, May 5, 1955 (R. 16020, pp. 53, 58). Its purpose—assuming that the proposed rules were to be adopted—was to avoid the confusion and uncertainty which would have resulted, if the Commission had continued during the interim period to accept duplicate filings and applications, and then had cancelled the filings and certificates.

duced by the four units, together with the interests (in aggregate) of fifteen other gas producers (Pet. App. 47).

During 1955, the four unit sellers applied for certificates of public convenience and necessity under Section 7 of the Gas Act (15 U.S.C. 717f) and filed the unit sales contracts as gas rate schedules pursuant to Section 4 and the Commission's existing producer regulations (Pet. App. 41-42). In each case, the schedules were accepted for filing by the Commission and certificates were subsequently issued governing the entire unit sales transaction. During the same period, petitioner also filed the identical four contracts as rate schedules pertaining only to the sale of its undivided interest, which were accepted for filing by the Commission in the course of processing approximately 10,000 such filings during a short period of time (Pet. App. 41-42). When the Commission subsequently discovered that petitioner's filings duplicated those of the operator-seller's, it rescinded its acceptance for filing of petitioner's four rate schedules (Pet. App. 44-45).

Petitioner during this period also applied for separate certification of its undivided share of the four sales (Pet. App. 41). The certificates were granted by the Commission, but were subsequently revoked, upon findings that they had been "inadvertently" or "improperly" issued (R. 16321, p. 105; R. 16548, p. 84), when the duplication with the certificate applications made by the four operator-sellers was discovered (Pet. App. 44-45). The Commission's rescission and revocation orders in each case were expressly based on its announced policy, *supra*, of rejecting fil-

ings by non-signers of unit sale contracts (R. 16020, p. 61; R. 16021, p. 216; R. 16213, p. 116; R. 16321, p. 104; R. 16410, p. 225; R. 16548, pp. 82, 238, 494).

When petitioner's applications for rehearing of the Commission's orders rescinding acceptance for filing of its rate schedules and revoking its certificates were denied, petitioner sought review in the Court of Appeals for the Fifth Circuit challenging the validity of the filing procedure.[8] That court, after a consolidated hearing, affirmed the Commission's orders in a single opinion (Pet. App. 37-53).

ARGUMENT

Petitioner seeks to outlaw a uniform and non-discriminatory procedure, adopted by the Federal Power Commission at the urging of most independent producers of natural gas, which permits simplified rate filings and certification of sales of natural gas produced by gas operating units. The Natural Gas Act does not prohibit a unit filing and certification procedure, and petitioner has not shown that it can or will be injured by the Commission's rule. Hence, the Commission was clearly justified in treating the unit sales as a single

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[7] Subsequently, on September 27, 1956, following completion of the rule-making proceeding and after most but not all of the filings and orders here in question, the Commission codified its "unit filing" procedure in Order No. 190, 21 F.R. 7616, 18 C.F.R. 154.91.

[8] Petitioner filed six petitions which were consolidated for hearing by the Court of Appeals. Nos. 16020, 16021, 16213, and 16410 challenged the orders rescinding acceptance of the four contracts as rate schedules. Nos. 16321 and 16548 related to the certificate revocation orders (Pet. App. 44-45).

jurisdictional sale for procedural purposes. No question of general importance or conflict of decisions is presented. There is no warrant for review by this Court.

1. Petitioner argues (Pet. 8-14) that the unit filing and certification procedure conflicts with the Natural Gas Act. It contends that as a natural gas company it has an absolute statutory right to file duplicating rate schedules and obtain certificates, even where its gas is sold with that of others in a single sale, and where there are rate schedules on file and certificates issued which apply to and authorize the sale of its undivided interest jointly with that of the other working interest holders. The court below rejected this contention, stating (Pet. App. 48):

> We agree with the Commission that each of the sales here involved made by an operator under an operating agreement could be properly treated as a single jurisdictional sale of the unit or leasehold gas production, and that each such sales contract could properly be the subject of a single rate filing. The same conclusion also applies to the applications for and granting of certificates of public convenience and necessity.

Petitioner has chosen to sell its gas jointly with others in a single sales transaction, although its contracts and the Commission's regulations would make it possible for it to terminate this arrangement and file separate rate schedules (Pet. App. 47). Although petitioner, as a "natural gas company", has an undoubted right to the benefit of the filing and certification provisions of the Natural Gas Act, the schedules now on file and the certificates issued governing its sales

fully protect its rights in this respect, as well as those of the other interest-holders. Petitioner can point to nothing in the statute which gives it the right physically to reproduce and file duplicate copies of the sales contracts which were already on file. By the same token, the statute cannot be read as requiring the issuance of certificates authorizing the sale of petitioner's undivided gas interest, additional to the outstanding certificates authorizing the entire unit sales. Petitioner therefore has no statutory basis for complaining of the Commission's treatment of the unit sale as a single wholesale in interstate commerce for purposes of Sections 4 and 7 of the Natural Gas Act, especially when a contrary procedure would cause needless expense to the producers as well as major regulatory difficulties for the Commission (Pet. App. 47).

2. Petitioner's arguments (Pet. 14-17) that it might be injured in the future by not being able to make its own filings were properly rejected by the court below as entirely speculative and without record foundation (Pet. App. 47, 50-51). As the court noted (Pet. App. 51), there is no reason to anticipate that the unit operators will neglect their own and petitioner's interests, which for filing purposes are identical; moreover, petitioner is not without a remedy should this occur.[10]

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[9] Since none of petitioner's substantive contract rights is in any way affected by the Commission's orders, *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (cited by petitioner, pp. 10, 13, 32), has no relevance to present issues.

[10] The Commission has allowed non-signer gas sellers, including petitioner, to make interim filings to prevent loss of

Petitioner also asserts (Pet. 17-18) that it would be injured in subsequent proceedings under Sections 4(e) or 5(a) of the Natural Gas Act (15 U.S.C. 717c(e), 717d(a), Pet. App. 71, 72), investigating the reasonableness of rates governing the unit sales. However, petitioner's ability to file duplicating rate schedules and certificate applications has no necessary bearing upon its rights in such review proceedings. Since the unit sales are single transactions at a single price, the Commission in a 4(e) or 5(a) proceeding would probably need to give some consideration to the terms of the overall sale, as well as considering separately the reasonableness of the price for the petitioner's gas. No reason is suggested, however, why petitioner's cost-of-service and revenue requirements could not be adequately explored in such review proceedings.

3. Petitioner also complains (Pet. 18-24) that the Commission's orders were entered without hearings and findings. These contentions are, of course, wholly dependent upon petitioner's main argument that its substantive rights were interfered with by the Commission's unit filing and certification procedures.[11]

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cases where the operator, at the beginning of independent producer rate regulation, had failed to file rate changes promptly (Sun Oil Company, Gas Rate Schedules Nos. 18, 62). Additionally, as stated *supra*, pp. 9, 10, petitioner has the contract option of taking its gas and selling separately. See Pet. App. 51.

[11] *United States* v. *Seatrain Lines*, 329 U.S. 424, relied on by petitioner, pp. 30-31, is inapposite since it involved a revocation of operating rights. Petitioner's operating rights as a natural gas company were in no way affected by the orders in question.

Since, as we have shown, the procedures are valid and do not affect petitioner's substantive rights, the Commission's procedural orders applying Order 190 to petitioner without discrimination were also valid.

In any event, the Commission's consideration and denial of petitioner's motions for rehearing of the Commission's orders constituted such hearing as might be required by due process. *Federal Communications Commission* v. *WJR, The Goodwill Station*, 337 U.S. 265. The additional hearing which petitioner seeks under the Administrative Procedure Act and under Sections 4(e), 5(a) and 7(c) of the Natural Gas Act would be concerned with the reasonableness of rates or the public convenience and necessity, neither of which were in any way involved in the Commission's orders. Petitioner points to no factual issues which should have been resolved by the Commission, and the court below expressly found that there were none (Pet. App. 52). Hence, the court was correct in concluding that the actions of the Commission did not violate petitioner's procedural rights.[12]

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[12] Petitioner also argues (Pet. 28-30) that the Commission should not have certified to the court as part of the record the operators' rate filings and certificate applications. Since these were clearly a part of "the record upon which the order complained of was entered" (Section 19(b) of the Act, 15 U.S.C. 717r(b)), the statute not only permitted but required that they be certified and filed with the court. Petitioner's contention thus in effect amounts to a restatement of its main argument respecting the validity of the orders themselves.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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